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No. 95-151

In the Supreme Court of the United States

OCTOBER TERM, 1995

THE KLAMATH TRIBE, PETITIONER

v.

STATE OF OREGON,
DEPARTMENT OF WATER RESOURCES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the McCarran Amendment, which allows joinder of the United States "as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source" (43 U.S.C. 666(a)), authorizes the State of Oregon to compel the United States and the Klamath Tribe to assert and defend their water rights before a state administrative agency.

2. Whether the McCarran Amendment authorizes Oregon to determine the United States' and the Klamath Tribe's surface water rights, but to exclude from determination rights to hydrologically connected ground water.

3. Whether the Klamath Tribe's due process rights are violated by Oregon's joinder of the Tribe in the Klamath Basin adjudication.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 44 F.3d 758. The opinion of the district court (Pet. App. 40-70) is reported at 774 F. Supp. at 1568.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1994. Petitions for rehearing were denied on March 27, 1995. On June 20, 1995, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 25, 1995, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the McCarran Amendment in 1952 to facilitate comprehensive determinations of water rights by allowing the United States to be "joined as a party in a state-court general water rights' adjudication." *Cappaert* v. *United States*, 426 U.S. 128, 146 (1976). The McCarran Amendment's "joinder provision" provides congressional consent "to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights," 43 U.S.C. 666(a), if the United States owns or is acquiring water rights and is a necessary party in the adjudication.

Prior to enactment of the McCarran Amendment, Oregon had established a system for administration of water rights. Until 1909, water rights were acquired under state law in Oregon either through the appropriation of water by diversion for beneficial use or as a riparian right, without administrative confirmation. Since 1909, state-law water rights have been acquired through applications, permits, and certificates. The 1909 system has been modified in various respects, but continues in force. It is now administered by the Oregon Water Resources Department (OWRD) under Chapters 536-545 of the Oregon Revised Statutes (ORS).

Oregon requires water right claimants to appear and submit proof of claims "[w]henever proceedings are instituted for determination of rights to the use of any water." See ORS 539.210. Oregon provides two alternative types of proceedings. Water rights may

be determined through: (1) a proceeding initiated as a judicial action in an Oregon circuit court, see ORS 539.021(2), 541.310; or (2) a proceeding initiated as an agency action before OWRD, which issues an order and determination of water rights, and concluded by a court proceeding that affirms or modifies the administrative determination. Oregon law contains no bar to adjudicating ground water and surface water rights together.

In the case of a proceeding initiated as an agency action, the Director of Water Resources conducts the administrative component by: (1) issuing a notice of intent to begin a determination (ORS 537.670(2) and (3); ORS 539.030, 539.040); (2) taking testimony (ORS 537.680; ORS 539.070); (3) holding a hearing on any contested issue (ORS 539.110); (4) examining the stream and diversions relevant to the adjudication (ORS 539.120); and (5) issuing findings of fact and an order determining the water rights in the stream (ORS 539.130(1)).

The Director then files in the appropriate circuit court a copy of the order of determination and findings of fact, along with the evidence (ORS 539.130(1)), and issues a notice of a court hearing in which parties may file exceptions to the determination (ORS 539.130(2) and (3), 539.150(1)). The court holds a hearing on any exceptions, in which "[a]ll parties may be heard * * * and the director may appear on behalf of the state" (ORS 539.150(3)). The court may remand the case for further testimony to be taken by the Director, after which the Director may be required to make a further determination (ORS 539.150(3)). After a "final hearing," the court must "enter a judgment affirming or modifying the order of the director as the court considers proper" (ORS 539.150(4)).

2. In September 1975, the United States filed a suit in the United States District Court for the District of Oregon to determine rights to the use of surface and ground water in the Klamath Tribe's former reservation lands within the drainage of the Williamson River in the Klamath Basin. See *United States* v. *Adair*, 478 F. Supp. 336 (1979), modified, 723 F.2d 1394, 1397 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).[1] On December 23, 1975, OWRD issued a notice that it would begin an investigation of claims to water in part of the Klamath Basin. See Gov't C.A. Excerpts of Record (E.R.) 32. The district court later determined in *Adair* that the Klamath Tribe has a federal reserved right to water necessary to protect hunting, fishing, and gathering rights. 478 F. Supp. at 346. It also ruled that the individual Indian land owners have a reserved right to water essential for agricultural needs. *Ibid.* The federal district court, however, did not quantify the water rights.[2]

On September 7, 1990, after unsuccessful attempts to resolve disputes over the propriety of the 1975

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[1] Before enactment of the McCarran Amendment, Oregon had conducted partial adjudications on some streams within the Klamath Basin but outside the boundaries of the Klamath Tribe's reservation. Congress enacted the Klamath Termination Act in 1954, ch. 732, 68 Stat. 718, 25 U.S.C. 564, but restored federal recognition of the Klamath Tribe in 1986, 25 U.S.C. 566 *et seq.*

[2] On appeal, the court of appeals explained that the district court expected that "[a]ctual quantification of the [reserved] rights to use of the waters of the Williamson River and its tributaries within the [federal] litigation area w[ould] be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment]." 723 F.2d at 1406.

notice under the McCarran Amendment, OWRD issued a new adjudication notice. E.R. 33. That notice expanded the litigation to include previously excluded portions of the Klamath Basin. The notice also informed permit and certificate holders that they are "parties" who may object to pre-1909 claims but "need to do nothing more" if they "do not wish * * * to challenge the claims of others." *Ibid.*

3. The United States concluded that the OWRD's notice threatened to deprive the United States of property and provided no forum for resolving the notice's legal propriety. On December 18, 1990, the United States filed this suit in federal district court to challenge aspects of the Oregon proceeding. The complaint sought relief on the grounds (1) that the McCarran Amendment does not authorize joinder of the United States either in administrative proceedings or in an adjudication that excludes all ground water rights and most of the of surface water rights in the basin, and (2) that the McCarran Amendment does not authorize Oregon to impose filing fees on the United States or to require the United States to file a "registration statement" identifying all of its water rights throughout the State.[3] The Klamath Tribe intervened and adopted the United States' arguments. It additionally claimed that Oregon's procedure would subject the Tribe to a biased decisionmaker and that

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[3] Oregon admitted that "[i]n the Klamath Basin, ground water and surface water are physically interrelated as integral parts of the hydrologic cycle." See E.R. 18 ¶ 43; E.R. 57 ¶ 43. Oregon also admitted that all post-1909 water right claimants in the Klamath Basin "would have the right to examine and challenge claims filed in the adjudication without opening their own rights to challenge." E.R. 59 ¶ 56.

Oregon was barred by treaty from imposing filing fees on the Tribe.

4. On September 30, 1991, the district court issued a decision. Pet. App. 40-70. The court held that: (a) Oregon's proceeding meets the "suit" and "comprehensiveness" requirements of the McCarran Amendment's joinder provision (*id.* at 55-62); (b) Oregon's procedures do not violate the Tribe's due process rights (*id.* at 62-65); (c) the United States is not required to file "registration statements" for its water rights that are not within the Klamath Basin (*id.* at 65-66); and (d) the United States (but not the Tribe) may be required to pay the State's filing fees (*id.* at 66-70). The court granted a motion for reconsideration, but upheld its prior decision (E.R. 135, 154). Judgment was entered on October 13, 1992 (E.R. 156), after which cross-appeals were timely filed by all parties.

5. The court of appeals affirmed all of the district court's rulings except its holding that the United States may be required to pay Oregon's filing fees. Pet. App. 1-39. The court of appeals specifically rejected the contentions of the United States and the Tribe that (a) Oregon's proceeding does not fall within the McCarran Amendment's waiver of immunity from "joinder as a *defendant* in any *suit*" for the adjudication of water rights because the United States has been required to participate as a claimant in administrative proceedings before a state agency (*id.* at 16-22); and (b) Oregon's proceeding is not a comprehensive adjudication of water rights because it permits no challenge by the United States to post-1909 surface water right claims and includes none of the claims to the admittedly hydrologically connected ground water in the Klamath Basin (Pet. App. 23-29).

The court also rejected the Klamath Tribe's due process challenge. *Id.* at 32-36. The court of appeals denied the United States' and the Tribe's respective petitions for rehearing and suggestions for rehearing *en banc*.

ARGUMENT

The United States agrees with petitioner that the judgment of the court of appeals conflicts with the rules properly governing joinder of the United States and the Indian Tribes in state water right adjudications under the McCarran Amendment. Further review of the issues raised here, however, does not appear warranted at this time.

1. Petitioner correctly criticizes the court of appeals' reasoning that Oregon may require the United States to participate in its administrative proceedings. The court failed to account for the express language of the McCarran Amendment, which provides as follows:

> Consent is given to join the United States *as a defendant in any suit* (1) for the adjudication of the rights to the use of water of a river system or other source * * * where * * * the United States is a *necessary party to such suit.* The United States, when *a party to any such suit,* * * * shall be subject to *the judgments, orders, and decrees of the court having jurisdiction* * * * *Provided,* that *no judgment for costs shall be entered against the United States in any such suit.*

43 U.S.C. 666(a) (emphasis added). The McCarran Amendment's text refers to "the court having jurisdiction," makes no mention of administrative agen-

cies, and is phrased in specialized legal terms that connote only judicial proceedings. Compare *Melkonyan* v. *Sullivan*, 501 U.S. 89, 94-95 (1991). That text provides no basis for concluding that Congress intended to subject the United States to joinder in state administrative proceedings.

The court of appeals gave insufficient weight to the statutory language of the McCarran Amendment and instead relied on its own conception of the general "purposes" and "policy" of the Amendment to determine its scope. See Pet. App. 18-19. That approach is contrary to this Court's familiar admonition that the language of a statute, which manifests the precise understandings that are "the very essence of legislative choice," provides the most persuasive indication of Congress's specific intent. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990); *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). The court of appeals' approach is particularly inappropriate because the McCarran Amendment constitutes a waiver of sovereign immunity that "must be strictly construed in favor of the United States" and "not enlarged beyond what the language of the statute requires." *United States* v. *Idaho*, 113 S. Ct. 1893, 1896 (1993).[4]

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[4] This Court made clear in *Idaho* that the McCarran Amendment is subject to the same rules of construction that apply to other waivers of federal sovereign immunity. See 113 S. Ct. at 1896. The court of appeals nevertheless applied the strict construction rule only to the question whether the amendment contains a waiver at all. Pet. App. 17-18. Having answered that undisputed proposition affirmatively, the court abandoned strict construction and improperly determined the scope of the waiver by looking outside of Congress's language

The court of appeals' misguided approach led it to conclude that Congress must have meant to waive the United States' sovereign immunity from *all* state procedures in place when the McCarran Amendment was enacted. If the court had focused on the statutory text, it would have instead perceived that Congress understood the substantial differences between a proceeding that at all times is conducted under a court's jurisdiction and a proceeding that is conducted by a state administrative agency. Congress deliberately chose to waive the United States' immunity to the former type of proceeding, but not to the latter.

Despite the court of appeals' error, there does not appear to be a compelling need for this Court's review at this time. No other federal or state appellate court has yet ruled on the propriety of requiring federal and tribal involvement in such proceedings,[5] and no federal or Indian water rights have yet been decided in this case. The practical effect of the court's error is likely to be limited in this instance, because Oregon has assured the United States and the court of appeals that the state court will accord *de novo* review to the administrative water right determinations in the judicial review phase of the Klamath Basin adjudication. Oregon C.A. Br. 6. Indeed, *de novo* judicial review may well be required in order for

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to "Congress' purposes and the historical context of the statute." *Id.* at 18.

[5] Because the doctrine of nonmutual collateral estoppel does not apply against the United States, *United States* v. *Mendoza*, 464 U.S. 154 (1984), the court of appeals' ruling in this case would not be binding on the United States in any state administrative or judicial forum outside of Oregon if another State sought to join the United States in comparable proceedings.

the proceeding to satisfy the "suit" requirement of the McCarran Amendment, even if (as the court of appeals held) the proceeding may be instituted in an administrative forum. Should Oregon conduct its administrative proceeding in a manner that is substantively or procedurally hostile to federal or tribal interests, the United States will be entitled to seek relief through a mandamus action or other appropriate judicial remedies.[6]

2. Petitioner also correctly criticizes the court of appeals' ruling that Oregon's adjudication is sufficiently comprehensive to satisfy the McCarran Amendment. The McCarran Amendment allows joinder of the United States only in adjudications that determine water rights in an entire "river system or other source." 43 U.S.C. 666(a). Oregon has nevertheless structured the Klamath Basin adjudication to determine conclusively only federal and tribal surface water rights in the Klamath Basin. The adjudication exempts all groundwater right claims from the adjudication despite the undisputed fact that ground and surface water are hydrologically connected in the Basin. It also exempts from challenge the tens of thousands of previously adjudicated and post-1909 certificated water right claims in the Klamath Basin, while permitting the "parties" holding those rights to challenge federal and tribal water right claims. Consequently, out of approximately 30,000 potential surface water claimants served by the State with notices of the adjudication, fewer than 250 non-federal

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[6] Similarly, the Tribe will have opportunities to identify and object to specific due process problems as the adjudication proceeds.

and non-Indian water right claims have been filed with OWRD.

The court of appeals' ruling that Oregon may exclude large categories of claims in the Klamath Basin without abrogating the United States' limited consent to suit is premised on an unnatural and hydrologically unsound construction of the term "river system." Furthermore, it starkly contrasts with this Court's understanding that the McCarran Amendment was enacted to allow the States to conduct comprehensive adjudications of water rights in a river system. See *Dugan* v. *Rank*, 372 U.S. 609, 618 (1963) (comprehensiveness not satisfied where "all of the claimants to water rights along the river are not made parties"); see also *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 810-811 (1976); *United States* v. *District Court for Eagle County*, 401 U.S. 520, 524-525 (1971). Even under the court of appeals' relaxed standard for construing the McCarran Amendment, the court's decision defeats "Congress' purposes" by encouraging future piecemeal adjudication. The United States and the Tribe will be forced to bring numerous federal or state court actions to address issues concerning competing claims to the same water, which necessarily will be left unresolved by Oregon's incomplete proceeding.

That defect, however, does not appear to warrant review at this time. The issue has not received extensive consideration from other courts of appeals or the highest courts of the various States. In addition, the United States and petitioner have some alternative, albeit less effective, remedies to ensure an adjudication of all relevant water rights in the Klamath Basin. Those remedies include the initia-

tion of an adjudication in federal court of all groundwater rights in the Klamath Basin, as well as appropriate challenges in judicial and administrative settings to certificated and previously "adjudicated" water rights that are in conflict with federal and tribal water rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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